# CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22C-65–11 OF 2014
MARY LIM J
22 JANUARY 2015

*Arbitration — Arbitration clause — Incorporation of arbitration clause — Whether arbitration clause properly incorporated into contract — Whether arbitration agreement can be incorporated by way of reference to another agreement — Arbitrate clause contained in letter of award – Letter of award not to take effect until formal contract drawn up — Formal contract not executed — Whether agreement to arbitrate established*

*Arbitration — Agreement — Jurisdiction of courts — Whether arbitration clause ousts jurisdiction of courts*

*Arbitration — Stay of proceedings — Application — Breach of construction contract — Whether arbitration agreement existed between parties — Whether subject matter of claim fell within arbitration agreement — Whether defendant had taken steps in proceedings disentitling defendant from seeking stay — Arbitration Act 2005 s 10*

The defendant was the main contractor of a construction project ('the project'). By a letter of award dated 1 November 2011, the defendant appointed the plaintiff as a nominated subcontractor to supply genset installation services for the project for the sum of RM20.5m ('the contract'). The plaintiff commenced these proceedings to claim for the balance payment for the works which it had carried out under the contract. The defendant made the present application seeking declarations that pursuant to O 12 r 10(1)(g) of the Rules of Court 2012 ('ROC'), the court did not have any jurisdiction over the defendant in respect of the subject matter of the claim. The defendant also sought for a stay of the present proceedings under s 10 of the Arbitration Act 2005 ('the Act') and for the claim to be referred to arbitration. The arbitration agreement relied on by the defendant was the arbitration clause found in cl 29.1 of the PAM Sub-Contract 2006. The defendant relied on cl 5 in the letter of award in arguing that the PAM Sub-Contract 2006 was to be read as having been incorporated into and forming part of the contract. The plaintiff in opposing the application contended: (a) that there was no arbitration agreement; (b) that even if there was an arbitration agreement or arbitration clause, the subject matter of the claim did not fall within the arbitration agreement; and (c) that

the defendant had taken steps in these proceedings disentitling the defendant from seeking the order for stay. A

**Held**, dismissing the application with costs of RM10,000:

(1) The first order sought by the defendant was a non-starter. The court's jurisdiction in arbitration and arbitration related matters is never ousted, even by the presence of any clear agreement to arbitrate. When it stays the proceedings in court and refers the parties to arbitration, the court is simply giving effect to the terms contractually agreed between the parties. It is not for want of jurisdiction; *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 referred (see paras 8–9). B C

(2) For s 10 of the Act to properly operate, first of all, there must be an agreement to arbitrate between the parties. An arbitration agreement can be incorporated by way of reference into another agreement. Section 9 of the Act allows for the arbitration agreement located in a different document to be incorporated by reference. The written arbitration agreement need not necessarily be found in the same contract containing the terms and conditions of the contract (see paras 11–12). D

(3) Where an arbitration agreement that meets the written requirements of the Act has been established, the court's primary task or duty is to give effect to that contractual agreement (see para 15). E

(4) There was no arbitration agreement or clause in this case. A plain reading of the final clause in the letter of award showed that the formal contract which will follow or adopt the terms and conditions of PAM Sub-Contract 2006 was not to take effect until and unless that formal contract was drawn up. This was not to say that there was no binding contract between the parties until a formal contract was drawn up. Until the formal contract was prepared and executed, the binding contract, and thereby the terms and conditions of contract, was to be found in the letter of award. The parties had clearly intended that a formal contract be prepared and executed. That formal contract would subscribe to or adopt the PAM conditions of sub-contract or the agreement and conditions of PAM Sub-Contract 2006 (see para 24). F G H

(5) In any case, even if there was an arbitration agreement premised on the incorporation by reference argument, the stay under s 10 was denied of the defendant by virtue of the step(s) already taken by the defendant up to the moment it filed the present application. The defendant had plainly taken an unreserved and unqualified step in the present proceedings. The defendant's unreserved or unqualified step of serving a 'Notice to produce documents referred to in pleadings dated 4 December 2014' issued pursuant to O 24 r 10 of the ROC amounted to the defendant having taken a step in the court proceedings (see paras 26–27). I

(6) With the mandatory terms in s 10, applicants who seek to rely on the arbitration clause and stay proceedings in court must make the application for stay promptly, even before filing of an appearance (see para 30).

**[Bahasa Malaysia summary**

Defendan adalah kontraktor utama projek pembinaan ('projek'). Melalui surat award bertarikh 1 November 2011, defendan melantik plaintif sebagai subkontraktor tercalon untuk membekalkan perkhidmatan pemasangan genset untuk projek bagi jumlah sebanyak RM20.5 juta ('kontrak'). Plaintif memulakan prosiding ini untuk menuntut bagi baki bayaran untuk kerja yang mana ia telah jalankan di bawah kontrak. Defendan membuat permohonan ini memohon deklarasi bahawa menurut A 12 k 10(1)(g) Kaedah-Kaedah Mahkamah 2012 ('KKM'), mahkamah tidak mempunyai apa-apa bidang kuasa terhadap defendan berkaitan dengan perkara yang dituntut. Defendan juga memohon untuk penangguhan prosiding ini di bawah s 10 Akta Timbang Tara 2005 ('Akta') dan untuk tuntutan dirujuk ke timbang tara. Perjanjian timbang tara yang dirujuk oleh defendan adalah klausa timbang tara yang didapati dalam klausa 29.1 Subkontrak PAM 2006. Defendan bergantung kepada klausa 5 dalam surat award menghujahkan bahawa subkontrak PAM 2006 hendaklah dibaca seperti telah dimasukkan ke dalam dan menjadi sebahagian daripada kontrak. Plaintif dalam menentang permohonan itu menegaskan: (a) bahawa tidak ada perjanjian timbang tara; (b) bahawa walaupun terdapat perjanjian timbang tara atau klausa timbang tara, hal perkara tuntutan itu tidak termasuk dalam perjanjian timbang tara; dan (c) bahawa defendan telah mengambil langkah-langkah dalam prosiding ini menyebabkan defendan tidak berhak untuk memohon perintah penangguhan.

**Diputuskan**, menolak permohonan dengan kos sebanyak RM10,000:

(1) Perintah pertama dipohon oleh defendan adalah bukan permulaan. Bidang kuasa mahkamah dalam timbang tara dan perkara berkaitan timbang tara tidak pernah disingkirkan, walaupun dengan kehadiran apa-apa perjanjian nyata kepada timbang tara. Apabila ia menangguhkan prosiding di dalam mahkamah dan merujuk kepada pihak-pihak kepada timbang tara, mahkamah hanyalah memberikan keputusan kepada terma-terma yang dipersetujui secara kontrak antara pihak-pihak. Ia bukanlah kerana kekurangan bidang kuasa; *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 dirujuk (lihat perenggan 8–9).

(2) Untuk s 10 Akta beroperasi dengan betul, pertama sekali, perlulah terdapat perjanjian untuk menimbang tara antara pihak-pihak. Perjanjian timbang tara boleh dimasukkan melalui cara rujukan perjanjian yang lain. Seksyen 9 Akta membenarkan perjanjian timbang tara yang terdapat di dalam dokumen yang berlainan untuk dimasukkan

melalui rujukan. Perjanjijan timbang tara bertulis tidak semestinya dijumpai dalam kontrak yang sama mengandungi terma dan syarat kontrak (lihat perenggan 11–12).

(3) Di mana perjanjian timbang tara memenuhi keperluan bertulus Akta telah dibuktikan, tugas atau tanggungjawab utama mahkamah adalah untuk memberi kesan kepada perjanjian kontraktual itu (lihat perenggan 15).

(4) Tiada perjanjian timbang tara atau klausa dalam kes ini. Bacaan biasa klausa akhir dalam surat award menunjukkan kontrak rasmi yang mana akan mengikuti atau mengguna pakai terma dan syarat Subkontrak PAM 2006 tidak memberikan kesan sehingga dan melainkan kontrak rasmi telah dibuat. Sehingga kontrak rasmi disediakan dan dilaksanakan, kontrak yang mengikat, dan dengan itu terma dan syarat kontrak, hendaklah didapati di dalam surat award. Pihak-pihak jelas berniat bahawa kontrak rasmi disediakan dan dilaksanakan. Bahawa kontrak formal akan bersetuju atau menerima pakai syarat PAM subkontrak atau perjanjian dan syarat Sub-Kontrak PAM 2006 (lihat perenggan 24).

(5) Dalam apa-apa kes, jika pun terdapat perjanjian timbang tara berdasarkan kemasukan melalui hujahan rujukan, penangguhan di bawah s 10 dinafikan terhadap defendan menurut langkah-langkah yang telah diambil oleh defendan sehingga masa ia memfailkan permohonan ini. Defendan telah secara biasa mengambil langkah secara berterus terang dan tak bersyarat dalam prosiding ini. Langkah secara nyata dan tak bersyarat defendan menyerahkan '*Notice to produce documents referred to in pleadings dated 4 December 2014*' dikeluarkan menurut A 24 k 10 KKM terjumlah kepada defendan telah mengambil langkah dalam prosiding mahkamah (lihat perenggan 26–27).

(6) Dengan syarat-syarat mandatori dalam s 10, pemohon yang memohon untuk bergantung kepada klausa timbang tara dan penangguhan prosiding di mahkamah mesti membuat permohonan penangguhan dengan segera, walaupun sebelum memfailkan kehadiran (lihat perenggan 30). ]]]

**Notes**

For cases on application, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2082–2132.

For cases on incorporation of arbitration clause, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1709–1711.

For cases on jurisdiction of court, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1640–1655.

**Cases referred to**

*Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625, FC (refd)

*Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656, CA (refd)

*Astel-Peiniger Joint Venture v Amos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328 (refd)

*Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, CA (refd)

*Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625, FC (refd)

*TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857, CA (refd)

*Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691, FC (refd)

*Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286, HC (refd)

**Legislation referred to**

Arbitration Act 2005 ss 8, 9, 9(5), s 10
Courts of Judicature Act 1964
Rules of Court 2012 O 12 r 10(1)(g), O 24 r 10

*Conrad Young (Tan Shang Neng with him) (Sreenevasan Young) for the plaintiff.*
*Heng Yee Keat (Christopher & Lee Ong) for the defendant.*

**Mary Lim J:**

**[1]** Enclosure (4) is the defendant's application for stay of these court proceedings under s 10 of the Arbitration Act 2005 ('Act 646'). It is the defendant's case that the subject matter of the plaintiff's claim falls within the ambit of the arbitration clause. Pursuant to s 10, it is mandatory that the court grants a stay and refer the parties and/or the claim to arbitration, the parties' preferred choice for resolution of their disputes or differences.

**[2]** The defendant's application is supported by the affidavit of its senior vice president, James Lees affirmed on 10 December 2014 (encl 5); to which the plaintiff has replied through its general manager, Quah Kim Huat's affidavit affirmed on 26 December 2014 (encl); and which the James Lee has responded in his affidavit in reply affirmed on 6 January 2014 (encl 7).

**[3]** These are some relevant background facts.The defendant is the main contractor of a project known as '*Cadangan membina dan menyiapkan: (A) Blok Pusat Data 3 Tingkat, B Blok M & E 3 Tingkat, 1 Unit SSU (Stesen Suis Utama) di atas Lot PT 29471, 71760 Bandar Techpark @ Enstek, Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khusus untuk Tetuan Teliti Datacentres Sdn*

*Bhd*' ('the project'). The employer of the project is Teliti Datacentres Sdn Bhd. A

**[4]** By letter of award dated 1 November 2011, the defendant appointed the plaintiff as a nominated subcontractor to supply, deliver, install, test, commission and maintain genset installation services for the project for the sum of RM20.5m ('the contract'). On 16 December 2011, the defendant paid a sum of RM2m to the plaintiff as down-payment under the contract. B

**[5]** The plaintiff claimed that it had carried out works under the contract and had submitted a total of 28 progress claims to the project's mechanical and electrical engineer, Perunding Eagles Engineers Sdn Bhd and the architect, Arkitek Pital for certification of the value of work done. These 28 progress claims totaled a sum of RM14,644,647.95. The plaintiff's demand for payment led to a partial payment of RM550,000 leaving a balance of RM13,786,972.15 as the amount still outstanding. The claim in court is for that balance sum. C D

**[6]** In its application, the defendant seeks, inter alia, orders of declaration that pursuant to O 12 r 10(1)(g) of the Rules of Court 2012, the court does not have any jurisdiction over the defendant in respect of the subject matter of the claim or relief sought by the plaintiff. The other principal order sought is the order of stay of the present proceedings and referring the parties and/or the claim to arbitration. E

**[7]** The application is opposed by the plaintiff who argued that the order is denied of the defendant for several reasons. Firstly, because there is no arbitration agreement. Secondly, even if there is an arbitration agreement or arbitration clause, the subject matter of this claim or litigation does not fall within the arbitration agreement. Thirdly, the defendant has taken steps in these proceedings disentitling the defendant from seeking the order for stay. F G

**[8]** After hearing full submissions of both learned counsel, and upon careful scrutiny of the cause papers including the affidavits and reply affidavits filed by both parties, the court agrees with the plaintiff. For the record, the court also agrees with the plaintiff that the first order sought by the defendant is a non-starter. The court's jurisdiction in arbitration and arbitration related matters is never ousted, even by the presence of any clear agreement to arbitrate. This was made abundantly clear by the Federal Court in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625, a case though decided under the old Arbitration Act of 1952 still holds good under the 2005 Act. In that case, the Federal Court pronounced that: H I

> ... The court always has jurisdiction in respect of a contract containing an arbitration clause and, subject to the jurisdiction of the court under the Act to send the matter for arbitration, there is nothing irregular on the part of the plaintiff to file

a writ in court notwithstanding the existences of the arbitration clause ...

**[9]** The fact that the court stays proceedings brought before it does not in any way suggest that there is want of jurisdiction on the part of the court. Generally, the court has jurisdiction to hear the claim or dispute as conferred under the Courts of Judicature Act 1964 ('Act 91'). The reason why any court would stay the proceedings in court harks back to the court's recognition of the parties' contractual choice of forum for the resolution of disputes between them. When it stays the proceedings in court and refers the parties to arbitration, the court is simply giving effect to the terms contractually agreed between the parties. It is not for want of jurisdiction. The courts always retains jurisdiction. It merely declines to hear and determine the dispute where there is a valid arbitration clause or agreement stipulating the parties' intention to resolve their disputes arising under the contractual arrangements by some other preferred mode, that is, by arbitration.

**[10]** Dealing with the substantive application, for s 10 of the Act 646 to properly operate, first of all, there must be an agreement to arbitrate between the parties. In other words,there must be an arbitration agreement. Generally, this can be found amongst the substantive terms and conditions in the underlying contract between the parties. In the instant case, the existence of the arbitration agreement itself is hotly contested. The defendant claimed that there is an arbitration agreement by operation of the principle of incorporation by reference while the plaintiff disagrees.

**[11]** It must be pointed out that while the plaintiff disagrees; it does however, agree that an arbitration agreement can be incorporated by way of reference into another agreement. This position is correct given that s 9 of the Act 646 allows for the arbitration agreement located in a different document to be incorporated by reference. This is what s 9 state:

(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in–

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the

existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

**[12]** The primary distinguishing feature of an arbitration agreement is that it is 'in writing'. That 'writing' however can be in any document, exchange of correspondence or pleadings. That written arbitration agreement need not necessarily be found in the same contract containing the terms and conditions of the contract, be it for work, sale or services. It may be located elsewhere. However, for the arbitration clause or agreement to operate, it needs to form part and parcel of the underlying contract. In order to form part and parcel of the underlying contract,the arbitration clause or agreement,found elsewhere, may be incorporated into the underlying contract by somereference. This is clearly allowed under sub-s 9(5) as was held by the Federal Court in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625. In that decision, the Federal Court was of the view that sub-s 9(5) 'addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract (see the case of *Astel-Peiniger Joint Venture v Amos Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328'.

**[13]** The Federal Court decided that 'the mere fact that the arbitration clause is not referred to in the contract and that a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause'. In fact, the Federal Court went further to add that 'There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required'.

**[14]** Just shortly before the Federal Court's decision in *Ajwa for Food*, the Court of Appeal in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857 had similarly opined that:

[18] In our judgment, s 9 of the Arbitration Act 2005 has introduced a significant change as regards the existence of an 'arbitration agreement'. This change is the result of the expansion in the meaning of the words 'arbitration agreement' between

A the Arbitration Act 1952 and the Arbitration Act 2005 ...

> [19] Section 9(5) provides that a reference in an agreement to a document containing an arbitration clause shall constitute an 'arbitration agreement', provided that the agreement is in writing and the reference is such as to make that clause part of the agreement. The inclusion of the clause providing for arbitration to form part of the agreement can be said to be under the doctrine of incorporation by reference'. There are presently authorities originating from Hong Kong, England and Canada where a clause providing for arbitration has been held to give rise to an 'arbitration agreement' notwithstanding that the document containing the clause was not signed by either party. In other words, the courts in these jurisdictions recognise that parties may enter into a valid 'arbitration agreement' by entering into a contract that incorporates by reference to another document that provides for arbitration.

**[15]** In an earlier decision of *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656, at p 666, the Court of Appeal also recognised that arbitration agreements may be incorporated into the contractual arrangements between parties by way of a reference. Where an arbitration agreement that meets the written requirements of the 2005 Act have been established, the court's primary task or duty is to give effect to that contractual agreement.

**[16]** In this case, the arbitration agreement relied on by the defendant is the arbitration clause found in cl 29.1 of the PAM Sub-Contract 2006. The defendant relies on cl 5 in the letter of award in arguing that the PAM Sub-Contract 2006 is to be read as having been incorporated into and forming part of the contract. With the presence of this arbitration agreement, the defendant argues that the court must mandatorily stay these proceedings and direct both parties to resolve the present claim by arbitration.

**[17]** In response, the plaintiff contends that the arbitration clause found in cl 29.1 of PAM Sub-Contract 2006 has not been incorporated into the contract between the parties because of the clear language of the letter of award.

**[18]** Having carefully scrutinising the relevant clause pointed out by the defendant, the court agrees with the plaintiff that there is actually no arbitration agreement or clause in this case. A careful reading of the relevant documents confirms the position taken by the plaintiff. This is what cl 5 in the letter of award dated 1 November 2011 states:

> In addition, the form of contract adopted for this Nominated Sub-Contract shall be based on PAM Conditions of Sub-Contract together with the tender documents and the terms and conditions stipulated herein this Letter of Intent.

**[19]** The parties agree that the 'PAM conditions of sub-contract' mentioned in the letter of award refers to the 'agreement and conditions of PAM

Sub-Contract 2006' (PAM Sub-Contract 2006). Clause 29.1 of that PAM Sub-Contract 2006 specifically houses the so-called 'arbitration agreement' or 'arbitration clause' and it reads as follow:

> In the event that there is a dispute over any adjudicator's decision, and/or any dispute of whatsoever kind between the Contractor and Sub-Contractor in connection with the Sub-Contract, it shall be referred to an arbitrator agreed between the parties ... The arbitration proceedings shall be in accordance with the provisions of the Arbitration Act 2005 or any statutory modification or re-enactment to the Act and the PAM Arbitration Rules or any modification or revision to such rules.

**[20]** As mentioned earlier, the plaintiff accepts that an arbitration agreement can be incorporated into another agreement such as the letter of award here, and that is by way of reference. Whether the arbitration clause in cl 29.1 of the PAM Sub-Contract 2006 is at all incorporated into the letter of award will depend on how the PAM Sub-Contract 2006 was referred to in the first place, the terms of such reference and, not to forget, the remaining terms in the letter of award. That is a matter of construction of the facts and the letter of award as seen in *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, a case decided under the old Arbitration Act 1952. It is observed that even then, the Court of Appeal was prepared to recognise the principle of incorporating an arbitration clause by reference, that the parties' intention to incorporate an arbitration clause may be deduced not only by their words but by their conduct. The terms of the relevant contract therefore must be examined and construed.

**[21]** This requirement is also evident from the terms of sub-s 9(5) which, inter alia, states:

> ... *provided* that the agreement is in writing and the reference is such as to make that clause part of the agreement.
>
> (Emphasis added.)

**[22]** Therefore, the contents of the letter of award here must be considered in order to determine whether it was the clear and unambiguous intention of the parties to incorporate the arbitration clause in cl 29.1 of the PAM Sub-Contract 2006 into the underlying contract, rendering that arbitration clause as part of the terms and conditions of the underlying written contract.

**[23]** The plaintiff's contention that the PAM Sub-Contract 2006 was never incorporated into and does not form part of the letter of award and thereby the contract between the parties, stems from the clear terms of the letter of award itself. Although cl 5 had provided for the formal contract to be 'based on PAM conditions of sub-contract', it did expressly provide that:

> Until such time the formal Contract documents are prepared and executed your

tender together with the duly signed copy of this Letter shall constitute a binding contract between both parties.

**[24]** The court agrees with the plaintiff. While the letter of award itself undoubtedly meets the requirements of s 9, the court cannot ignore the clear intention of the parties as evinced from this final clause. A plain reading of that final clause in the letter of award shows that the formal contract which will follow or adopt the terms and conditions of PAM Sub-Contract 2006 is not to take effect until and unless that formal contract is drawn up. This is not to say that there is no binding contract between the parties until a formal contract is drawn up or prepared and executed. Far from it. It is the case of until the formal contract is prepared and executed, the binding contract, and thereby the terms and conditions of contract, is to be found in the letter of award. The parties had clearly intended that a formal contract be prepared and executed. That formal contract would subscribe to or adopt the PAM conditions of sub-contract or the agreement and conditions of PAM Sub-Contract 2006. Until that comes about, the binding contract between the parties is to be found in the plaintiff's 'tender together with the duly signed copy of this letter'. This final term in the letter of award takes away any construction and conclusion that the reference to the PAM conditions of sub-contract in cl 5 as rendering those conditions as part of the terms and conditions of the letter of award.

**[25]** With respect, the court is not prepared to stretch the meaning and application of sub-s 9(5) to include an instance where the mere reference to PAM conditions of sub-contract in cl 5 is sufficient to incorporate the PAM conditions of sub-contract and thereby the arbitration clause in cl 29.1 as part of the conditions of contract between these parties before the court. To do that will run counter to the clear intention of the parties and certainly, not in the face of the final term of the letter of award.

**[26]** In any case, even if there is an arbitration agreement premised on the incorporation by reference argument, the stay under s 10 is denied of the defendant by virtue of the step(s) already taken by the defendant up to the moment it filed the present application. In this regard, it is the step(s) taken by the defendant prior to and other than the application for stay which comes under scrutiny.The court agrees with the plaintiff that the defendant has plainly taken an unreserved and unqualified step in the present proceedings. The step(s) in question relate to the invocation and reliance of O 24 r 10 of the Rules of Court 2012.

**[27]** This is what happened. Upon being served the writ and the statement of claim, the defendant, through its solicitors, wrote to the plaintiff a letter dated 4 December 2014 informing the plaintiff that it was 'entitled to the following documents referred to in your clients' said statement of claim'. Those

documents were the various progress claims and other claims made by the plaintiff as well as a certification of a sum of RM16,336,972.15 as at 16 October 2012; and payment of RM550,000 made by the defendant. Together with that letter, a 'Notice to Produce Documents Referred to in Pleadings dated 4 December 2014' issued 'Pursuant to O 24 r 10 of the Rules of Court 2012' was enclosed 'by way of service on you as solicitors for the above named plaintiff'. The request, made through legal counsel, was unqualified and unreserved.

**[28]** It is the court's view that this unreserved or unqualified step of serving a 'Notice to produce documents referred to in pleadings dated 4 December 2014' issued 'Pursuant to O 24 r 10 of the Rules of Court 2012' amounts to the defendant having taken a step in these Court proceedings. Where that is the case, it is no longer open to the defendant to seek an order for stay under s 10 which reads as follow:

> (1) A court before which proceedings are brought in respect of a matter which is the subject matter of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

**[29]** Although cl 29.1 would be wide enough to encompass the current claim of the plaintiff or the subject matter of the current proceedings in court if it were applicable in the first place, which the court has ruled that it does not for the reasons already set out; the mandatory stay nevertheless cannot be ordered. This is because the defendant had, by its own action or conduct, waived reliance on that arbitration clause and had agreed that the plaintiff's claim be resolved in court through the present proceedings. Save for that permitted under s 10, the defendant had itself utilised the process of court as found in the Rules of Court 2012. Where it has done so, it is regarded as having taken a step other than the step of filing for a stay. Under such circumstances, the order under s 10 is no longer available as of right.

**[30]** In *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286 (Kuala Lumpur High Court Civil Suit No D5(D6)-22-734-2008), I had expressed the view that with the mandatory terms in s 10, applicants who seek to rely on the arbitration clause and stay proceedings in court must make the application for stay promptly, even before filing of an appearance. I had made that observation after discussing the Federal Court's decision in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625. In *Sanwell*, again, a case decided under the old Arbitration Act of 1952, the Federal Court had observed and distinguished the facts in another case, that of *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691, that the defendant there had taken more than one step in the proceedings, ie one step in filing the conditional

appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s 6 of the Act, the second step certainly was. In *Winsin Enterprise*, an order for stay under s 10 was refused because the defendant had sought and was granted by the plaintiff, an extension of time to file defence. I took the view that the act of seeking for an extension of time to file defence was a step taken in the proceedings in court, depriving the dependant order of stay sought.

**[31]** It is the view of this court that with the new Rules of Court 2012 doing away with the filing of conditional appearances, there is now greater reason to insist on strict compliance with the provisions of Act 646. Added to this are the recent amendments to Act 646 which remind the court of non-intervention save in matters expressly provided– see s 8 of the Act 646.

**[32]** Now, s 10 requires an applicant such as the defendant to file for a stay of the proceedings in court 'before taking any other steps in the proceedings'. In fact, such an application may be made through the procedure provided under s 50. The object of such a requirement is clearly to preserve the defendant's position of non-submission to jurisdiction for the purpose of resolving the dispute or claim in question. Once the defendant has made that application, it may take any other step and that would not compromise or taken as having compromised the defendant's position on the appropriate forum for resolution of the dispute or claim.

**[33]** In this case, the step taken by the defendant, that is the issue and service of a 'Notice to produce documents referred to in pleadings dated 4 December 2014 pursuant to O 24 r 10 of the Rules of Court 2012' even before the filing of this application on 12 December 2014, deprives the defendant of this order for a mandatory stay. Such a notice issued under O 24 r 10 serves as part of the discovery process available for claims filed in court. There are serious ramifications and consequences upon the issue and service of such a notice. A party who is served with such a notice must respond within four days to the notice. Where a party fails to comply with such a notice, the other party may apply to court for an order of discovery.

**[34]** The party who is served with the notice, that is the plaintiff, must in response, issue a notice specifying in it a time within seven days for the defendant to inspect those documents that the plaintiff does not object to produce. If, however, the plaintiff objects to produce any of the documents, then the plaintiff must show cause why it should not produce. The burden is on the plaintiff to justify any refusal of production. These documents form part of the pleaded case.

**[35]** In this case, the defendant's notice dated 4 December 2014 was issued without qualification or reservation. It is the court's view that the dictates of s 10 do not permit the defendant to take any other step save that of applying for a mandatory stay. The notice issued under O 24 r 10 of the Rules of Court 2012 is clearly a step taken even before the application for stay was filed. It is plain that the defendant was availing itself of the process provided to claims filed in court when it issued that notice dated 4 December 2014. It is not proper or appropriate for the defendant to prevaricate and utilise the process of court when and where it choose fit or suitable; yet decrying the appropriateness of the forum after having used that process.

**[36]** The plaintiff has also raised the additional ground of there being no dispute within the meaning of cl 29.1. By this, the plaintiff was contending that the defendant had, by the contemporaneous evidence in the form of correspondence between the parties, shown that there was in fact, no dispute to begin with. In essence, the plaintiff was alleging that the partial payment by the defendant was evidence of admission of indebtedness on the part of the defendant. I do not find it necessary to address this argument given that the court has already found that there is no arbitration agreement to begin with; and even if there was, the present application is not available due to the step taken by the defendant.

**[37]** In the circumstances, the application is dismissed with RM10,000 costs.

*Application dismissed with costs of RM10,000.*

Reported by Kanesh Sundrum